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No. 07-551

FILED
DEC 18 2007
OFFICE OF THE CLERK
SUPREME COURT

In The

Supreme Court of the United States

JOSHUA MICHAELY,

Petitioner,

v.

PATTI MICHAELY,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The Second District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

According to the Petition for Writ of Certiorari:

This case presents a very important question to be resolved concerning the imposition of discovery sanctions: does the trial court have an affirmative duty to impose sanctions tailored to remedy the specific discovery abuse and to ensure such sanctions are not imposed as a punishment, or does the trial court have plenary power to impose any sanctions it sees fit, no matter how broad and how punishing, and no matter if it strips a litigant of their right to be heard at trial? If plenary power to punish is permissible, then what if any limitations does the due process clause impose on such punishment for discovery abuse?

According to Respondent, the Question is:

Where a party such as Petitioner has been found to have been intentionally evasive in responding to discovery – even lying to avoid giving substantive responses – did the trial court abuse its discretion in (i) precluding that party from presenting evidence on the subjects as to which substantive responses were evaded, and (ii) establishing facts about the evaded subjects against the offending party?

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JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. §1257(a), apparently claiming that his right to due process was violated by the trial court's imposition of discovery sanctions and that the violation was not rectified by the California Court of Appeal.

A federal question was not, however, presented in the California proceedings; and the published opinion of the California Court of Appeal expressly provides that it is not based on a consideration of any federal (or state) due process constitutional provision.

Further, the action of the California Court of Appeal in upholding the imposition of sanctions is consistent with the federal discovery rules and with federal case authorities which have examined the same legal issues and found no constitutional due process violation where a litigant has willfully failed to provide discovery so as to deprive the other party of relevant facts. (E.g. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); *Roadway Express, Inc. v. United States Department of Labor, Administrative Review Board* 495 F.3d 477 (2007).)

COUNTER STATEMENT OF THE CASE

The findings and order of the trial court ("Report and Order") included a finding that Petitioner had intentionally given evasive responses at his lengthy

deposition and that his evasiveness was pervasive and egregious. (Pet. App. 19a; CT, vol. 49, 10021:9-11.)[1] The findings also stated that Petitioner's conduct rose to "a glaringly obtrusive level . . . so as to intentionally undermine [Respondent's] discovery efforts and render his appearance at the deposition the equivalent of [Petitioner] refusing to sit for his deposition as directed by the Court Order filed . . . on May 26, 1999." (Pet. App. 19a; CT, vol. 49, 10021:12-15.)

Among the other findings was the determination that Petitioner's testimony was willfully untruthful (Pet. App. 26a), as well as inconsistent and incredible. (Pet. App. 32a., CT, vol. 49, 10028:24-26.) The Report and Order gives numerous examples to support the findings (Pet. App. 27a-52a), and is supported further by a 208 page Appendix with additional examples. (CT, vol. 49, 10019 – vol. 50, 10270.)

The trial court also found that Petitioner had a history of resisting Respondent's discovery efforts and had failed to produce any of the records that he kept in a Texas storage facility. (Pet. App. 73a-75a; CT, vol. 49, 10052-10055.)

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[1] "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari, and the number(s) following refer to the specific page(s) of the Appendix. "CT" refers to the Clerk's Transcript prepared for the proceedings in California. "Vol." refers to the Volume of the Clerk's Transcript, and the number(s) following refer to the specific page(s).

Finally, the trial court found that the "imposition of lesser sanctions would not remedy [Petitioner's] abuse of the discovery process." (Pet. App. 86a; CT, vol. 49, 10061:18-22.)

The Report and Order did not provide for any terminating sanctions (e.g. striking Petitioner's answer, or declaring a default.) Instead, it provided for issue and evidentiary sanctions as to the value of the community estate at separation, Petitioner's management and fiduciary duties, Petitioner's breach of those duties, the marital standard of living, and Petitioner's ability to pay support. (Pet. App. 77a-79a; CT, vol. 49, 10055:15-10056:24.) Additional evidentiary sanctions precluded Petitioner from offering evidence to counter claims of his misappropriation of numerous specified assets. (Pet. App. 79a-83a; CT, vol. 49, 10057:10-10058:27.)

Each evidentiary preclusion corresponded to an asset as to which Petitioner had failed to supply substantive information at his deposition. (E.g. Pet. App. 79a-82a; CT, vol. 49, 10043:17-10044:28; & 10057:10-28.)

In light of these findings, there were really only two questions presented for review before the California Court of Appeal: (1) did substantial evidence support the trial court's findings, and (2) based on the findings, were the sanctions imposed within the trial court's broad range of discretion?

The Court of Appeal answered both of these questions in the affirmative and consequently affirmed.

Petitioner did not raise any due process or other federal questions in his challenge in the trial court. (CT, vol. 41, 8301-8318.) And, except for Petitioner's argument about the trial court's utilization of the collateral estoppel doctrine to adopt the findings made earlier by a bankruptcy judge, neither the United States Constitution nor any federal statute formed the basis of Petitioner's challenge in the California appellate proceedings. As to Petitioner's collateral estoppel argument, the California Court of Appeal decision states:

> We need not reach the merits of [Petitioner's due process] arguments. Petitioner does not tell us which issues were "litigated and resolved by the Bankruptcy Court," so that we cannot tell what effect the collateral estoppel finding had. Moreover, even if, as he asserts, the court adopted [the discovery referee's] report based on the bankruptcy court's findings, it was at most an alternative ground. A ruling on collateral estoppel could make no difference here. (Pet. App. 14a-15a.)

Two important conclusions can be drawn from the foregoing: (1) Petitioner's due process argument was confined to the collateral estoppel issue – which he has not raised in his Petition for Writ of Certiorari, and (2) the California Court of Appeal did not reach

the due process issue in affirming the discovery sanctions and judgment.

As a result, no "state court of last resort has decided an important federal question . . . " as that term is used in Rule 10 of the Rules of the Supreme Court of the United States. It is also doubtful that a "right specially set up or claimed under the Constitution . . . " has been implicated in any of the California proceedings that preceded Petitioner's present Petition for Writ of Certiorari. Consequently, Petitioner has failed to demonstrate a compelling reason for a writ of certiorari to be granted.

SUMMARY OF ARGUMENTS

As Petitioner is now before this Court, he has – for the first time in the appellate history of this action – referred to the Constitution of the United States. In none of the earlier appellate proceedings, including the Petition for Review to the California Supreme Court, did Petitioner cite to the federal constitution or federal case law. Even in the Petition for Writ of Certiorari, Petitioner cites no federal decisions. Accordingly, Petitioner has not truly presented a federal question nor has he preserved a federal question for review by this Court.

What was at issue below was whether the trial court had abused its discretion in (1) imposing discovery sanctions which established certain facts as true, and (2) precluding Petitioner from introducing

evidence as to certain issues. This is the same standard of review that this Court has applied to federal actions. (E.g. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976).)

Additionally, Petitioner has inaccurately described certain aspects of the record and the decision of the California Court of Appeal.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. Petitioner Did Not Present an Important Federal Question to the California Appellate Courts, Nor Has He Presented One in His Petition

When the Petition for Writ of Certiorari quoted Section 1 of the Fourteenth Amendment to the United States Constitution, it represented the first time in all of the appellate proceedings that the Fourteenth Amendment or the federal constitution had been mentioned by Petitioner.

Petitioner did not refer to the federal constitution in his Opening Brief or his Reply Brief before the California Court of Appeal. Petitioner did not refer to the federal constitution in his Petition for Review to the California Supreme Court. As noted earlier, Petitioner made a "due process" argument in the California Court of Appeal, but it concerned a matter not raised in the Petition for Writ of Certiorari to this

Court, that is: the trial court's use of the collateral estoppel doctrine.

In the Petition for Review to the California Supreme Court, the words "Due Process" are mentioned once, on page 29, but only in connection with Petitioner's complaint about the trial court's **alleged** failure to explain how the sanctions were tailored to redress Petitioner's failure to give substantive responses to deposition questions.

Even assuming *arguendo* that the "due process" arguments made to the California appellate courts were the same as those presented in the Petition for Writ of Certiorari, it is not clear that Petitioner was even referring to the United States Constitution as opposed to the California Constitution, which also has a due process clause. (Cal. Const. Art. 1, § 7.) This is of particular note since the proceedings were in California, where it would be logical to assume that the California Constitution would have been implicated in the proceedings before any consideration of the federal constitution.

Finally, in this regard, it should be noted that the Petition for Writ of Certiorari cites no decisions of this Court or any federal court to support his purported federal question presentation. This lack of federal authority is consistent with the briefs and Petition for Review filed by Petitioner in the California appellate system. Instead of citing federal decisional law, Petitioner refers to the same California cases he cited in the California proceedings – none of

which purport to determine a federal question. Only one of the California cases, *Vallbona v. Springer*, 43 Cal.App.4th 1525 (1996), addresses any due process arguments, but it rejects a "due process/denial of right to trial" argument similar to that alluded to in the Petition for Writ of Certiorari. (*Id.* at pp. 1546-1547.) Consequently, it does not aid Petitioner.

2. This and Other Federal Courts Have Already Upheld Severe Discovery Sanctions in Response to Due Process Challenges, So The Decision of the State Court Cannot Be in Conflict With Federal Court Decisions

Rule 37 of the Federal Rules of Civil Procedure governs discovery abuses in federal litigation. In particular, paragraph (b)(2)(A) delineates seven different sanctions that may be imposed for a party's failure to obey a discovery order. These sanctions mirror those authorized by the California Code of Civil Procedure, sections 2023.030 and 2025.450(d). Specifically, subparagraph (b)(2)(A)(ii) of Rule 37 empowers the trial court to prohibit a disobedient litigant from introducing evidence as to certain designated claims. This corresponds to the evidentiary sanctions described in California Code of Civil Procedure section 2023.030(c). Subparagraph (b)(2)(A)(i) of Rule 37 permits the court to direct that certain matters be taken as established. This corresponds to the issue sanctions described in California Code of Civil Procedure section 2023.030(b). And subparagraphs (b)(2)(A)(iii), (v) and (vi) of Rule 37, authorize the trial

court to strike pleadings, dismiss the action or render a default. These correspond to the terminating sanctions authorized by California Code of Civil Procedure section 2023.030(d).

Since Federal Rule 37 empowers federal trial courts to impose sanctions against litigants who disobey orders to provide discovery, it is not surprising that the federal judiciary has already addressed the potential due process challenges arising under federal litigation.

In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982), this Court rejected a due process challenge to the imposition of a sanction for the failure of certain defendants to produce documents as required by the trial court. The discovery sanction established the contested issue of *in personam* jurisdiction against the offending defendants. (*Id.* at 699, 102 S.Ct. at 2102.)

In rejecting the due process challenge this Court cited its earlier decision in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530 (1909), where this Court held that a state court had not violated the due process clause by striking the answer and entering default against a defendant who had failed to comply with a pretrial discovery order.

Consistent with the foregoing is the Court of Appeals, Seventh Circuit, opinion in *Roadway Express, Inc. v. United States Department of Labor, Administrative Review Board*, 495 F.3d 477 (2007).)

There, an Administrative Law Judge had imposed a sanction which prevented the employer from presenting a certain category of evidence, the practical effect of which was to undermine the employer's defense. (*Id.* at 481.) The employer challenged the discovery sanction on due process grounds, but the Court of Appeals repulsed the challenge. At page 484, the Opinion rejects the employer's due process argument by analogizing to Rule 37 and the decision in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee.*

From these existing federal cases, it is clear that the California Court of Appeal decision is not in conflict with the decisions of the federal judiciary.

3. The Purported Question Presented by Petitioner Relies on Inaccurate Descriptions of the Record and the California Decision

The sections that follow describe three notable misstatements contained in the Petition for Writ of Certiorari.

A. Petitioner characterizes the decision of the California Court of Appeal as granting "license to all judges to impose any discovery sanctions they want for any behavior without need and regard to how

such sanctions are designed to redress the discovery abuse . . . " (Pet. 2.)[2]

This is a gross misreading of the Court of Appeal Opinion. The Opinion simply affirms the sanctions imposed by the trial court for Petitioner's egregious evasion of his duty to respond forthrightly to Respondent's discovery after being ordered to sit for his deposition.

The trial court did not "impose any discovery sanctions [it] want[ed to]" – it only imposed the sanctions authorized by California Code of Civil Procedure sections 2023.030 and 2025.450 for the offending conduct described in these statutes.

B. Petitioner also mis-characterizes the severity of the sanctions when he claims that he "was prevented from presenting any evidence of any kind at the trial of this matter." (Pet. 16-17) This is simply not true. The court did not strike Petitioner's pleadings or declare a default, and nothing in the Report and Order precluded Petitioner or his experts from testifying or offering documentary evidence concerning his ability to pay Respondent's fees, the reasonableness of Respondent's fees, the inflation issue or the amount of the support arrearage.

The order imposing sanctions only prevented Petitioner from presenting evidence concerning the value of the community estate at separation, Petitioner's

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[2] "Pet." refers to the Petition for Writ of Certiorari.

management and fiduciary duties, Petitioner's breach of those duties, the marital standard of living, and Petitioner's ability to pay support. (Pet. App. 79a-84a; CT, vol. 49, 10055:15-10056:24.) Petitioner was also precluded from offering evidence to counter claims of his misappropriation of numerous specified assets. (Pet. App. 79a-84a; CT, vol. 49, 10057:10-10058:27.)

C. Petitioner complains that the decision of the California Court of Appeal does not "contextualize" the sanctions. (Pet. 16.) However, this complaint is belied by the decision itself, where the California Court of Appeal wrote:

> Husband also contends that the sanctions were an abuse of discretion because Wife had all the information she needed from other sources, including the business records he produced, and that she could have gone to third parties to obtain the information she needed. When his record references are examined, Husband is relying on the fact that Wife obtained documents from his office at the inception of this action, in 1995, on the fact that he answered special interrogatories in 1998, and on a March 1995 letter from his counsel to her counsel listing twenty properties (including the family home and its contents) and several debts, putting a value on each, and suggesting a property distribution.
>
> Husband also cites Sowell's deposition, which Wife took in late 1998 or early 1999 after bringing two motions to compel, the first to obtain the deposition, and the second after

Sowell (represented by Husband's attorney) asserted rights under the Fifth Amendment to the United States Constitution and refused to answer any questions.

To state the facts is to refute them. The 1995 information was simply too old, given Husband's plethora of assets and the fact that, as Judge Denner found, Husband moved money from entity to entity, and, as Judge Saeta found, this was a complicated case involving tracing of assets. The 1998 interrogatories were prefatory to the deposition. There is no showing that the answers could replace the deposition, and no reason to assume so. We say the same about Sowell's deposition. Husband points out that in 1995, Wife declared that Sowell had access to the business and financial records at Husband's office and was authorized to sign on various bank accounts held by some of Husband's business entities, and that in her motions to compel, Wife alleged that Sowell was a critical witness. That does not mean that she could replace Husband as a witness.

In this portion of his brief, Husband also cites the facts that his support obligation was reduced $21.000 per month to $1,700 per month, based on evidence that his income was $5,000. This took place in September of 1999, and we cannot see that the finding is relevant to any issue on appeal.

Finally in this regard, Husband contends that the court erred by not considering the

> history of all discovery, arguing more specifically that the court erred in finding that Sowell's deposition was irrelevant and not to be considered in determining sanctions. The order Husband cites is the *referee's* order denying Husband's request that she consider Sowell's deposition testimony. Judge Goldin listed four grounds for her ruling: (1) the testimony is irrelevant to the motion for sanctions; (2) the Code of Civil Procedure did not authorize Husband to submit the deposition to the court on a sanctions motion (citing Code of Civil Procedure section 2025, subd. (u), since repealed); (3) the fact that Sowell sat for her deposition did not relieve Husband from his obligation to comply with discovery; (4) Husband failed to timely submit the testimony.
>
> Husband does not cite to anything which would show that he asked the trial court to consider the testimony. The trial court thus did not err.

As is clear from the foregoing quote, the Court of Appeal fully considered the prior discovery, and it is plain to see how it impacted its decision to affirm the judgment of the trial court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December 18, 2007